

IN THE SUPREME COURT FOR THE STATE OF ALASKA  
LANCE PRUITT,

Appellant,

v.

LT. GOVERNOR KEVIN MEYER, in his  
official capacity as Lt. Governor for the  
State of Alaska, and GAIL FENUMIAI, in  
her official capacity as Director of the  
Division of Elections,

Appellees.

ELIZABETH A. HODGES SNYDER,

Intervenor.

Supreme Court Case No. S-17951  
(Consolidated)

Case No. 3AN-20-09661 CI

**APPELLANT'S OPENING BRIEF**

Appeal from the Superior Court for the State of Alaska,  
Third Judicial District  
Hon. Josie Garton

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of the State of Alaska this  
\_\_\_\_ day of January, 2021.

By: \_\_\_\_\_  
Supreme Court Clerk

## **JURISDICTIONAL STATEMENT**

This matter arises out of an election contest pursuant to AS 15.20.540 which was filed in the Superior Court for the State of Alaska Case No. 3AN-20-09661 CI pursuant to AS 15.20.550. On December 29, 2020, the Superior Court issued its Findings of Fact and Conclusions of Law with regard to Count II – Violation of AS 15.10.090.

A Notice of Appeal along with a Statement of Points on Appeal was filed in this Court on December 30, 2020.

## **PARITES TO THE CASE**

1. Appellant Lance Pruitt was a candidate for House District 27 in the 2020 General Election, and was the Plaintiff in Superior Court Case No. 3AN-20-09661 CI.

2. Defendant Lieutenant Governor Kevin Meyer is the sitting Lt. Governor of the State of Alaska who oversees the Division of Elections, and was a Defendant in Superior Court Case No. 3AN-20-09661 CI.

3. Defendant Gail Fenumiai is the Director of the Division of Elections for the State of Alaska, and was a Defendant in Superior Court Case No. 3AN-20-09661 CI.

4. Intervenor Elizabeth A. Hodges Snyder was a candidate for House District 27 in the 2020 General Election, and was the Intervenor in Superior Court Case No. 3AN-20-09661 CI.

## **STATEMENT OF THE ISSUES FOR REVIEW**

1. *Malconduct Sufficient to Change the Outcome of an Election.* Was the Division's failure to timely secure an in-person voting location for precinct 915, and its

failure to properly notify voters of the unnecessarily last-minute change, sufficient to change the outcome of the election?

2. *Motion to Dismiss.* Was it error for the superior court to dismiss a sufficiently-plead complaint in this expedited election contest?

### **STATEMENT OF THE CASE**

This case arises out of the 2020 General Election in Alaska, specifically the seat for District 27 of the Alaska House of Representatives. House District 27 (“HD27”) is located in East Anchorage. The candidates for HD27 were Lance Pruitt and Liz Snyder.

Following a recount by the Alaska Division of Elections (“Division”) the results were determined to be that Lance Pruitt had received 4,563 votes, while Liz Snyder had received 4,574 votes, a margin of 11 votes. On December 9, 2020, a complaint was filed in the Superior court by Pruitt, along with six qualified voters, alleging issues with the election sufficient to change the outcome of the election and contesting the results.<sup>1</sup> The allegations were premised on the fact that the precinct polling location in HD27 Precinct 915 Chugach Foothills No. 1 (“HD27-915”) was changed without proper notice resulting in voter confusion, voter disenfranchisement, and compromised the integrity of the election. Because of the voter disenfranchisement, individuals who were not able to cast their ballot due to lack of notice of the location change were of such number sufficient to change the results of the election. Trial commenced on December 22, 2020, and the

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<sup>1</sup> Due to considerations relating to judicial economy, the six additional voters who were initially included as Plaintiffs did not oppose a motion dismiss their claims filed by the Intervenor.

taking of evidence concluded on December 23, 2020. The Court issued its findings of fact on December 29, 2020.

At trial, Division Director Gail Fenumiai and Region II Elections Supervisor Julie Husmann both testified. Director Fenumiai testified that she has served as Director for a combined total of over nine years.<sup>2</sup> Director Fenumiai testified that even in a normal year, the Division may have to change polling locations close to an election date.<sup>3</sup> With regard to the General Election, Director Fenumiai testified that the Official Election Pamphlet, reflecting an incorrect polling location, had gone out 22 days before the General Election, about October 12, 2020.<sup>4</sup>

Supervisor Husmann testified that she is responsible for supervising elections in the Anchorage and Mat-Su Valley areas.<sup>5</sup> Among her job duties, Supervisor Husmann is responsible for obtaining polling locations for elections to take place.<sup>6</sup> Supervisor Husmann testified that there were 18 polling location changes within the Anchorage area in 2020; there are 119 total polling locations within the Anchorage area.<sup>7</sup>

In 2020, there were two polling location changes within HD27.<sup>8</sup> In addition to HD27-915, the polling location for Stuckagain Heights (27-935) was moved.<sup>9</sup> The precinct

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<sup>2</sup> Tr. at 157.

<sup>3</sup> *Id.*

<sup>4</sup> Tr. at 162.

<sup>5</sup> Tr. at 35.

<sup>6</sup> Tr. at 35-6.

<sup>7</sup> Tr. at 52.

<sup>8</sup> Tr. at 62.

<sup>9</sup> *Id.*

change in Stuckagain Heights changed in July before the August Primary Election.<sup>10</sup> The polling location for the Primary and General Election for Stuckagain Heights was the same.<sup>11</sup> Unlike the lack of notice for HD27-915, the Division mailed out voter notification cards to the voters in Stuckagain Heights which notified voters who were affected by the polling location change.<sup>12</sup>

Supervisor Husmann testified at trial that during the 2020 Primary Election, the HD27-915 polling location was originally set at Wayland Baptist University where it had been for several years.<sup>13</sup> However, on August 17, 2020, the day before the Primary Election, she was telephoned by Raymond Baker who advised her of a COVID-related questionnaire that was to be asked of all the voters at Wayland Baptist University.<sup>14</sup> Rather than subject voters to the questionnaire, Supervisor Husmann decided that she would relocate the polling location to Muldoon Town Center, and she directed Mr. Baker to go to

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Tr. at 63.

<sup>13</sup> Tr. at 36.

<sup>14</sup> *Id.*

that location.<sup>15</sup> The only notification of this change provided to HD27-915 voters in the Primary Election was a poster placed at Wayland Baptist University.<sup>16</sup>

Supervisor Husmann testified that the Division intended to have the 2020 General Election for HD27-915 at the Muldoon Town Center where the Primary Election had taken place.<sup>17</sup> However, the Division took no action to confirm the location, had no further communication, and just assumed that was where the HD27-915 polling location would be.<sup>18</sup> In fact, Supervisor Husmann testified that the decision to move to Muldoon Town Center was made on the spot, and the Division had never had any communication with Muldoon Town Center about adding the second precinct to that location.<sup>19</sup> It was not until October 22, 65 days after the Primary Election, and only 12 days before the General Election, that anyone from the Division reached out to the owner of Muldoon Town Center to confirm the polling location for HD27-915.<sup>20</sup> When Supervisor Husmann did finally contact the owner, she was informed that the Division could not have the HD27-915

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<sup>15</sup> *Id.* There were two polling locations at Muldoon Town Center, HD27-915 and a precinct for HD15. This is concerning, because sending voters to this location sent them to a voting location out of their District. As Dr. Ruedrich explained, when a voter from HD27 cast his or her vote here via a questioned ballot on General Election day, that voter was totally unable to vote in the State Senate or State House for HD27. The records admitted demonstrate that this occurred to six voters on General Election Day. *See* Tr. at 106.

<sup>16</sup> Tr. at 37. Publicly available records on the Division of Elections website demonstrate that on the Primary Election ballots, Lance Pruitt ran unopposed in the Republican Primary and Liz Snyder ran unopposed in the ADL Primary.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Tr. at 38.

<sup>20</sup> *Id.*

location at Muldoon Town Center for several reasons; i.e., the Division had moved it there without informing him that now two precinct locations would be at that one location, voting equipment had previously been left onsite and not picked up until two weeks after the Primary Election, and there had been an incident that occurred during the Primary Election.<sup>21</sup> Director Fenumiai admitted that the HD27-915 polling place was changed to Begich Middle School for the 2020 General Election, because the Muldoon Town Center property owner did not want to host two polling places at this facility.<sup>22</sup>

When asked what action was taken in the 65 days between the Primary Election on August 18 and October 22 regarding the HD27-915 polling location, the only action by the Division that either Director Fenumiai or Supervisor Husman could identify was an update to the Division website and hotline.<sup>23</sup> Director Fenumiai admitted that between the Primary Election and October 22, no other efforts had been made to notify voters of the HD27-915 polling place location change.<sup>24</sup>

Following the Primary Election, the Division took no additional steps to notify voters that the polling location would not be at Wayland Baptist University for the General Election.<sup>25</sup> The Division website was updated, and anyone who registered in HD27-915 following the Primary Election received a voter registration card reflecting Muldoon Town

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<sup>21</sup> Tr. at 40.

<sup>22</sup> Tr. at 160.

<sup>23</sup> Tr. at 64, 170.

<sup>24</sup> Tr. at 170.

<sup>25</sup> *Id.*

Center as the polling location for HD27-915.<sup>26</sup> However, Supervisor Husmann specifically testified that cards were not mailed to voters in HD27- 915 to notify them of the polling location change.<sup>27</sup> The Division provided no public notification in a local Anchorage newspaper, nor did Supervisor Husmann recall notifying the Municipal Clerk.<sup>28</sup>

By its own admission, the Division was scrambling to find a polling location for HD27- 915.<sup>29</sup> Director Fenumiai and Supervisor Husmann testified that the Anchorage School District (“ASD”) had offered up all the schools as backup polling locations.<sup>30</sup> Supervisor Husmann testified that ASD made this blanket offer before the Primary Election, and Director Fenumiai believed this offer had again been extended in September.<sup>31</sup> On October 22, Supervisor Husmann reached out to ASD to obtain Begich Middle School as the polling location for HD27-915.<sup>32</sup> On Monday, October 26, the ASD confirmed the location was conditionally approved and advised they would confirm with the Begich Middle School Principal.<sup>33</sup> Begich Middle School was contracted as the polling place on October 27, 2020.<sup>34</sup>

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<sup>26</sup> Tr. at 38.

<sup>27</sup> *Id.*

<sup>28</sup> Tr. at 39.

<sup>29</sup> Tr. at 45.

<sup>30</sup> *Id.*

<sup>31</sup> Tr. at 160.

<sup>32</sup> Tr. at 39.

<sup>33</sup> *Id.*

<sup>34</sup> Exc. 000015.



The form used by the Division for Polling Place Change was dated October 23, 2020.<sup>35</sup> This was regarding the change from Muldoon Town Center to Begich Middle School.<sup>36</sup> Supervisor Husmann noted that she had completed the reason for the change on the form.<sup>37</sup> It is of note that the reason for the change in the Primary Election was emergent, but the same was not the reason for the change in the General Election. There are only two boxes checked on the form, neither of which pertained to notice to voters. Notably unchecked are several boxes, as follows<sup>38</sup>:

- ☐ New location updated in VR system or will be updated on: \_\_\_\_\_
  - ☐ Provided notice of change to municipal clerk, community councils, tribal groups (AS 15.10.090)
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**DIRECTOR'S OFFICE USE:**

- ☐ Prepare/mail polling place change cards.
- ☐ Advertise in local newspaper - or - ☐ notify regional office to post notice of change \*\*
- ☐ Polling place updated on web and IVR.
- ☐ Change included in OEP (even-numbered years)

\*\*If change is for municipal election in odd-numbered year, have regional office check with clerk to verify municipality is advertising change in paper.

These unchecked boxes include “notification to municipal clerk, community councils, tribal groups (AS 15.10.090),” along with the four boxes under the Director’s Office Use section which also pertain to notice.<sup>39</sup> The information on the completed form conformed to the testimony from Director Fenumiai and Supervisor Husmann that the only

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<sup>35</sup> Exc. 000017.

<sup>36</sup> *Id.*

<sup>37</sup> Tr. at 41.

<sup>38</sup> Exc. 000017.

<sup>39</sup> *Id.*

location change notice provided to voters included posters at the prior polling location sites, and a change to the Division website and voter telephone hotline.<sup>40</sup>

With regard to the Division website, there was no particular emphasis or attention drawn to notify voters of the change, it was only if a voter searched for their polling location on the website, that they would find the Begich Middle School location, along with the word “NEW”.<sup>41</sup>

District 27				
PRECINCT	NAME	LOCATION	ADDRESS	
27-900	CHENEY LAKE	THE ALASKA UNITED METHODIST CONFERENCE	1660 PATTERSON ST ANCHORAGE	
27-905	MULDOON NO. 3	SUSITNA ELEMENTARY SCHOOL	7500 TYONE CT ANCHORAGE	
27-910	MULDOON NO. 4	ST PATRICK'S PARISH	2111 MULDOON RD ANCHORAGE	
27-915	CHUGACH FTHILLS NO.1	BEGICH MIDDLE SCHOOL	7440 CREEKSIDE CENTER DRIVE ANCHORAGE	NEW
27-920	CHUGACH FTHILLS NO.2	BENSON SECONDARY/SEARCH	4515 CAMPBELL AIRSTRIP RD ANCHORAGE	
27-925	SCENIC PARK	SCENIC PARK ELEMENTARY SCHOOL	3933 PATTERSON ST ANCHORAGE	
27-930	BAXTER	BAXTER ELEMENTARY SCHOOL	2991 BAXTER RD ANCHORAGE	
27-935	STUCKAGAIN HEIGHTS	BAXTER ELEMENTARY SCHOOL	2991 BAXTER ROAD ANCHORAGE	

**PLAINTIFF**  
EXHIBIT NO. 9  
ADMITTED ☐  
(CASE NUMBER)

SOA 000013

Kathleen Steigleman testified that she served as an election worker in HD27-915 for both the 2020 Primary and General Elections.<sup>42</sup> She noted that the location during the

<sup>40</sup> *Id.*

<sup>41</sup> Tr. at 47; Exc. 000014.

<sup>42</sup> Tr. at 19.

primary had been moved from the University to Muldoon Mall.<sup>43</sup> She testified that sometime in the week prior to the election she was notified the HD27-915 location would be at Begich Middle School, and she was surprised by that since the Primary was at the Muldoon Mall.<sup>44</sup> During her work, Ms. Steigleman testified to her observation of the confusion that voters experienced; she testified that voters were confused because they did not know where they were supposed to vote.<sup>45</sup>

In addition to Ms. Steigleman, Mr. Raymond Baker also testified at trial.<sup>46</sup> Like Ms. Steigleman, Mr. Baker served as an election worker in HD27-915 for both the 2020 Primary and General Election Days.<sup>47</sup> Mr. Baker testified that the day before the 2020 Primary, in his role as Chair of the election workers in HD27-915, he went to Wayland Baptist University to ensure all the supplies were delivered and setup, and that they would be prepared to hold the 2020 Primary Election at such location.<sup>48</sup> Upon entering the building, it was requested that he fill out a form responding to several questions pertaining to COVID-19.<sup>49</sup> He inquired with the employees at Wayland Baptist University and was advised that if voters were to enter the building the next day, they would likewise have to

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<sup>43</sup> Tr. at 21.

<sup>44</sup> Tr. at 19-20.

<sup>45</sup> Tr. at 21.

<sup>46</sup> Tr. at 23.

<sup>47</sup> Tr. at 24.

<sup>48</sup> Tr. at 25-6.

<sup>49</sup> Tr. at 26.

complete the same questionnaire form.<sup>50</sup> Given his concerns that other voters would not have to do this in other polling locations, Mr. Baker contacted the Division Region II office to raise his concern.<sup>51</sup> Within minutes the Division called Mr. Baker back and told him that the precinct would be moved to a new location at Muldoon Town Center.<sup>52</sup>

Mr. Baker testified that the HD27-915 Primary Election did proceed at the Muldoon Town Center location.<sup>53</sup> Mr. Baker testified that a sign had been put up at the Wayland Baptist University to direct voters to Muldoon Town Center, but he was not the individual who posted that sign.<sup>54</sup> Muldoon Town Center housed two precinct locations during the Primary.<sup>55</sup> In addition to HD27-915, the Muldoon Town Center served as a polling location for one of the precincts within District 15.<sup>56</sup>

Mr. Baker learned a few days prior to the 2020 General Election that he would again be working at the polling location for HD27-915.<sup>57</sup> When he originally went to pick up the supplies the Wednesday before the General Election (October 28, 2020), he was under the impression the polling location HD27-915 would be at the Muldoon Town Center.<sup>58</sup>

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Tr. at 27.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

However, when he returned to pick up the registers on the Sunday before the General Election (November 1, 2020), he was informed that HD27-915 would be moving to Begich Middle School.<sup>59</sup> That was the first time Mr. Baker learned that HD27-915 would be at Begich Middle School.<sup>60</sup> He was given a poster to be placed at Muldoon Town Center and an A-frame sign to be placed at Wayland Baptist University.<sup>61</sup> He taped the poster at the South Entrance Door at Muldoon Town Center and he placed the A-frame sign near the entrance at Wayland Baptist University immediately after he left the Division office on Sunday afternoon prior to the election.<sup>62</sup>

On General Election Day, Mr. Baker indicated that after a voter raised an issue about the Division website very early in the morning shortly after the polls opened, he personally accessed the Division website.<sup>63</sup> He noted that the polling location for HD27-915 was still showing the wrong location on the main screen.<sup>64</sup> However, if he clicked further on that location, it did accurately show the location as Begich Middle School.<sup>65</sup> He testified there were two places on the Division website where the location was listed, and of those two places, one listed a prior incorrect location and one listed Begich Middle School, the correct

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<sup>59</sup> Tr. at 27-8.

<sup>60</sup> Tr. at 28.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Tr. at 30.

<sup>64</sup> *Id.*

<sup>65</sup> Tr. at 31.

location.<sup>66</sup> Mr. Baker called the Division.<sup>67</sup> He did not recall who he spoke to, but he advised them of the website issue and then went on about his business.<sup>68</sup>

Lance Pruitt testified that he as a candidate was never informed by the Division of the HD27-915 polling place location change to Muldoon Town Center.<sup>69</sup> He learned of the change during the Primary Election from his constituents.<sup>70</sup> Going into the 2020 General Election, Representative Pruitt was not sure where the HD27-915 polling place would be held.<sup>71</sup> He had spoken with a since-retired employee of Wayland Baptist University who indicated that he was not sure it would be back there, as no one with the University had heard from the Division.<sup>72</sup> Given the confusion, Rep. Pruitt contacted the Division Region II office in Anchorage on October 21, 2020 to determine the location for the HD27-915 polling location for General Election Day.<sup>73</sup> The Division employee directed Rep. Pruitt to the Division website, and together they looked at the precinct

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Tr. at 67. Dr. Snyder likewise testified that as a candidate she was not informed of the HD27-915 polling place location change. While she claimed she did not have knowledge of polling place location issues, evidence admitted at trial demonstrates that at minimum her campaign had knowledge of the same. *See* Tr. at 127; Exc. 000018.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Tr. 67-8. During cross-examination of Supervisor Husmann the State asked if the polling place had ever formally been changed in HD27-915. *See* Tr. at 51. However, the evidence demonstrates the Division did nothing to confirm the original Wayland Baptist University Location or to confirm Muldoon Town Center as the HD27-915 polling location.

<sup>73</sup> Tr. at 68.

location for HD27-915 which was at the time identified as Muldoon Town Center.<sup>74</sup> As a result of the confirmation, Rep. Pruitt sent out a mailer within HD27-915 reminding voters that their polling location was located at Muldoon Town Center.<sup>75</sup> Rep. Pruitt did not learn of the change to Begich Middle School until the weekend before the General Election.<sup>76</sup>

Mary Jo Cunniff is a registered voter within HD27-915.<sup>77</sup> She has resided in that area since 1984.<sup>78</sup> She testified that she was mad and frustrated she received no notification from the Division regarding the precinct polling place location changes in 2020.<sup>79</sup> She testified she had received a mailing from the Division when in previously the location had previously been moved from the Boy Scouts to Wayland Baptist University.<sup>80</sup> She testified that she is a business woman and left her house early to be able to have time to vote, as she had several business appointments throughout the day and had heard there were voting lines.<sup>81</sup> She went to Wayland Baptist University, and she noticed there were only a few cars and no voting sign.<sup>82</sup> It was not until she walked up to the door that she was able to see the notification sign directing voters to Begich Middle School. She was mad as this

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<sup>74</sup> *Id.*

<sup>75</sup> Tr. at 69.

<sup>76</sup> Tr. at 70.

<sup>77</sup> Tr. at 113.

<sup>78</sup> Tr. at 114.

<sup>79</sup> *Id.*

<sup>80</sup> Tr. at 117.

<sup>81</sup> Tr. at 114.

<sup>82</sup> *Id.*

had happened previously in the Primary, where she had not been notified of a change, and there had been nothing in the news.<sup>83</sup> By the time she arrived at Begich Middle School she knew she would not be on time to her business and other commitments if she stayed and voted.<sup>84</sup> She reiterated how frustrating this was, as the same thing had happened in the Primary, particularly as the Division could have provided notification on Facebook or the news.<sup>85</sup>

Randolph (“Randy”) Ruedrich, PhD. testified as an expert to discuss the impact the polling place location change had on the election results.<sup>86</sup> Dr. Ruedrich based his expert analysis on his significant knowledge, skill, and experience in politics and reviewing and analyzing election results.<sup>87</sup> Based on his experience, Dr. Ruedrich testified that changing polling places suppresses the vote.<sup>88</sup> Dr. Ruedrich discussed that movement poses a challenge to voters, and the law requiring notice to voters is the attempt to repair that challenge.<sup>89</sup>

Dr. Ruedrich noted that the 2020 General Election was different than any other prior election, and therefore it would be errant to compare it to prior elections.<sup>90</sup> The basis of

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<sup>83</sup> *Id.*

<sup>84</sup> Tr. at 115.

<sup>85</sup> *Id.*

<sup>86</sup> Tr. at 74.

<sup>87</sup> Tr. at 75-7.

<sup>88</sup> Tr. at 105.

<sup>89</sup> Tr. at 107.

<sup>90</sup> Tr. at 80.



this differential was by looking at three prior contested HD27 races and comparing the turn out in the Early, Absentee, and Election Day numbers.<sup>91</sup> He noted that there had been a significant shift in the way that Republican and Democratic voters turned out to vote.<sup>92</sup> Specifically, he testified that on average, the Early Vote had been carried by the Democratic candidate by a margin of 62 percent to 57 percent.<sup>93</sup> But in 2020, the Republican Pruitt had carried the Early Vote by just over 50 percent.<sup>94</sup> He testified that on average, the Absentee Vote had been carried by the Republican candidate by a margin of 61 percent to 54 percent.<sup>95</sup> But in 2020, the Democrat Snyder had carried the Absentee Vote by 65 percent.<sup>96</sup> He testified that on average, the Election Day vote had been carried by the Republican candidate by a margin of 52 to 51 percent. But in 2020, the Republican Pruitt had carried by the Election Day Vote by 65 percent.<sup>97</sup> Thus, these significant shifts in voting behavior supported his conclusion that 2020 was dissimilar to any prior election.<sup>98</sup>

In order to determine if the General Election Day vote was impacted by the precinct location change, Dr. Ruedrich looked at the percentage of voter turnout in precincts 910

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<sup>91</sup> *Id.*

<sup>92</sup> Tr. at 78-80.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

and 920.<sup>99</sup> He selected these districts because of the substantial similarities in the precincts, particularly number of registered Republicans and Democrats in these precincts are substantially similar to those in HD27-915.<sup>100</sup> Dr. Ruedrich also noted that all three of these districts are contiguous, and that in his experience with redistricting and driving through the neighborhoods there are notable similarities among them.<sup>101</sup> In fact, he discussed that the neighborhood of Chugach Foothills was split into two precincts (915 and 920) by the Division.<sup>102</sup>

Based on his analysis, Dr. Ruedrich determined that in precinct 910, 3.32% more voters turned out than in HD27-915.<sup>103</sup> He also determined that in precinct 920, 3.99% more voters turned out than in HD27-915.<sup>104</sup> This resulted in a suppression of voters in HD27-915 with an average undervote of 3.66 percent.<sup>105</sup> This means that 57 voters were not able to vote, which Dr. Ruedrich opined was sufficient to change the outcome of the election given the 11-vote margin between the candidates.<sup>106</sup>

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<sup>99</sup> Tr. at 82-5.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Tr. at 81-2.

<sup>103</sup> Tr. at 85.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* As Dr. Ruedrich testified, Lance Pruitt received 65% of the Election Day vote. While a new election is necessary pursuant to the law, given the random impact of the malconduct, if we were to look at the traditional formula adopted by the Court, Lance Pruitt would gain 37 votes while Liz Snyder would gain only 20 votes, resulting in Lance Pruitt winning the election contest by six votes.

Dr. Snyder's attorneys solicited Dr. Ralph Townsend to testify on behalf of the State.<sup>107</sup> Dr. Townsend attempted to discredit the expert testimony of Dr. Ruedrich based on the mathematical calculations therein.<sup>108</sup> In doing so, Dr. Townsend noted the Dr. Ruedrich's math was correct, but he criticized the analysis.<sup>109</sup> However, Dr. Townsend testified he has no experience in political or election review, did not study any of the information underlying Dr. Ruedrich's report, had no alternative analysis, and had not taken any time to analyze the basis of Dr. Ruedrich's comparison.<sup>110</sup>

### **STANDARD OF REVIEW**

This Court may consider an election contest by appeal of a Superior Court decision with regard to an election contest pursuant to AS 15.20.540.<sup>111</sup>

Election contests are filed with the Superior Court, and are heard by this Court only upon appeal of the superior court's decision.<sup>112</sup> An election contest pursuant to AS 15.20.540(1) requires a showing of malconduct, fraud or corruption of election officials sufficient to change an election result.<sup>113</sup> The standard, set forth in *Hammond v. Hickel*,

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<sup>107</sup> Tr. at 154.

<sup>108</sup> Tr. at 153.

<sup>109</sup> Tr. at 153.

<sup>110</sup> Tr. 154-5. While testifying, Dr. Townsend admitted he had no understanding of the basis of Dr. Ruedrich's comparison, likely based on his utter lack of experience in the requisite field. Tr. at 155.

<sup>111</sup> See e.g. *Cissna v. Stout*, 931 P.2d 363 (Alaska 1996).

<sup>112</sup> See, e.g., *Id.* at 367, see also, *Willis v. Thomas*, 600 P.2d 1079, 1081 (Alaska 1979).

<sup>113</sup> *Cissna*, 931 P.2d at 366-367.

defines malconduct as “a significant deviation from statutorily or constitutionally prescribed norms” which introduces a bias into the vote, or constitutes a significant deviation from the norm.<sup>114</sup> Significant deviations “will amount to malconduct if the significant deviations from prescribed norms by election officials are imbued with scienter, a knowing noncompliance with the law or a reckless indifference to norms established by law.”<sup>115</sup>

A dismissal pursuant to Alaska R. Civ. P. 12(b)(6) shall be reviewed by this court de novo.<sup>116</sup>

## ARGUMENT

### **1. *Malconduct Sufficient to Change the Outcome of an Election.* Was the Division’s failure to timely secure an in-person voting location for precinct 915, and its failure to properly notify voters of the unnecessarily last-minute change, sufficient to change the outcome of the election?**

Citing the United States Supreme Court’s decision in *Bush v. Gore*, the Alaska Supreme Court has recognized that each citizen’s constitutional rights are at issue when the state employs unfair and wrongful election procedures that result in a disparate impact across the community.<sup>117</sup> This is because equal protection encompasses more than merely

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<sup>114</sup> 588 P.2d 256, 258 (Alaska 1978) (citing *Boucher v. Bomhoff*, 495 P.2d 77 (Alaska 1972)).

<sup>115</sup> *Id.* at 259.

<sup>116</sup> See e.g. *Forrer v. State*, 471 P.3d 569 (Alaska 2020).

<sup>117</sup> *Miller v. Treadwell*, 245 P.3d 867, 870 (Alaska 2010)

giving citizen a right to vote; as the U.S. Supreme Court explained, “[e]qual protection applies as well to the manner of its exercise.”<sup>118</sup>

### **A. Standard for Election Contest**

Alaska Statute 15.20.540 sets forth the grounds for an election contest. A defeated candidate may contest the election of any person on the grounds that there was “malconduct, fraud, or corruption on the part of an election official... [or] any corrupt practice as defined by law sufficient to change the outcome of the election.”<sup>119</sup>

#### **1. The Definition of Malconduct**

Malconduct has been defined as “a significant deviation from statutorily or constitutionally prescribed norms.”<sup>120</sup> Malconduct exists if a bias is introduced into the vote, and the bias is “the result of a significant deviation from lawfully prescribed norms.”<sup>121</sup> In addition,

significant deviations which impact randomly on voter behavior will amount to malconduct if the significant deviations from prescribed norms by election officials are imbued with scienter, a knowing noncompliance with the law or a reckless indifference to norms established by law.<sup>122</sup>

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<sup>118</sup> *Bush v. Gore*, 531 U.S. 98, 104 (2000).

<sup>119</sup> AS 15.20.540.

<sup>120</sup> *Hammond v. Hickel*, 588 P.2d 256, 258 (Alaska 1978).

<sup>121</sup> *Id.* at 259.

<sup>122</sup> *Id.*

In rare instances, “an election will be so permeated with numerous serious violations of law, not individually amounting to malconduct, that substantial doubt will be cast on the outcome of the vote.”<sup>123</sup> In such circumstances, these numerous serious violations will amount to malconduct.<sup>124</sup>

## **2. The Concept of Sufficient to Change the Outcome of the Election**

In order to determine whether or not events were sufficient to change the outcome of the election, the court must consider whether or not bias was injected into the vote.<sup>125</sup> When bias is found to favor one candidate over the other, and the number of votes impacted can be determined with precision, the vote can be retabulated to award votes to the disfavored candidate to determine if the results would be different.<sup>126</sup> However, when the number affected by the bias cannot be precisely determined, a new election may be ordered.<sup>127</sup> Where voters were impacted at random, and bias was not injected, ballots must again be retabulated proportionately based on election results.<sup>128</sup>

In the case at hand, there were several voters who were disenfranchised and unable to vote as a result of the change in polling location. And because of new voting patterns unique to the 2020 General Election, the impact of the Division’s failure to timely and

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 260.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* (citing *Boucher v. Bomhoff*, 495 P.2d 77 (Alaska 1972)).

<sup>128</sup> *Id.*

properly change polling locations was felt disproportionately. This specific issue is a case of first impression for this Court. However, it is logical that a candidate cannot call voters knowing the result of the election to testify they would have voted for the Plaintiff, and thereby change the result of the election.<sup>129</sup> An election cannot be changed on the present statement of a voters' past intentions.<sup>130</sup> The only remedy therefore in this instance is for a new election.

### **B. Last Minute Change of the HD 27-915 Polling Place**

AS 15.10.090 sets forth mandatory directions to the Director of the Division with regard to what is required if a polling location is changed. Only one of these mandatory conditions delineates when it can be done whenever possible; the other four are required.

The law sets forth that public notice **must** include:

(1) whenever possible, sending written notice of the change to each affected registered voter in the precinct;

(2) providing notice of the change  
(A) by publication once in a local newspaper of general circulation in the precinct;  
or

(B) if there is not a local newspaper of general circulation in the precinct, by posting written notice in three conspicuous places as close to the precinct as possible; at least one posting location must be in the precinct;

(3) posting notice of the change on the Internet website of the division of elections;

(4) providing notification of the change to the appropriate municipal clerks,

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<sup>129</sup> See e.g. *Rubens v. Hodges*, 837 S.W.2d 465, 468 (Ark. 1992). While this case is not binding on the Court in Alaska, it is instructive.

<sup>130</sup> *Id.* (quoting Floyd R. Mechem, *Public Offices and Officers* § 237 (1890)).

community councils, tribal groups, Native villages, and village regional corporations established under 43 U.S.C. 1606 (Alaska Native Claims Settlement Act); and

(5) inclusion in the official election pamphlet.

Evidence taken at trial demonstrates that the Division acted with knowing and reckless disregard for the law. The conduct by the Regional Supervisor in the execution of her duties was wholly negligent and dilatory. The testimony taken at trial established the following timeline:

1. August 17 Election worker determines that people will have to fill out a COVID-19 questionnaire at the established HD27-915 polling place location.
2. August 17 Division moves HD27-915 from Wayland Baptist University to Muldoon Town Center – notification provided by poster at Wayland Baptist University.
3. **August 18 Primary Election Day**
4. October 21 Pruitt contacts Division regarding HD27-915.
5. October 22 First time Division takes any steps to confirm the polling location for HD27-915 for the 2020 General Election – advised Muldoon Town Center is not an option.
6. October 22 Division requests ASD allow Begich Middle School be used as the HD27-915 polling location for the 2020 General Election.
7. October 26 ASD grants tentative approval for use of Begich Middle School.
8. October 27 Division and ASD execute contract for use of Begich Middle School.



9. October 28 in Baker picks up election materials – no notification of change Location.
10. November 1 signs Baker picks up registers – is asked to place location change at Wayland Baptist University and Muldoon Town Center.

**11. November 3 General Election Day**

The timeline demonstrates that the Division knew it had an issue with the HD27-915 polling location on August 17, and that it took no timely efforts to secure a polling place for HD27-915 voters for the General Election. This despite the fact the Division had a blanket offer from the ASD, and could have changed the HD27-915 polling location to Begich Middle School immediately following the Primary Election, thereby allowing more than ample time for proper notice under the law.<sup>131</sup>

In its order at paragraph 2, the Superior Court found that the HD27-915 polling place was moved by the Division of Elections one day before the 2020 Primary Election and six days before the 2020 General Election. However, this is contrary to the evidence presented at trial. Director Fenumiai and Supervisor Husmann both testified that while the Division changed the Primary Election polling place due to COVID, the General Election polling place was changed due to the owner of the location being dissatisfied with his interaction with the Division. Namely, that the Division moved the Primary Election to

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<sup>131</sup> Even if the intent was to maintain the polling location at Muldoon Town Center, the Division had a duty after the Primary to notify voters that the change had occurred. But the Division did nothing instead.

such location without even so much as notification to the owner that he would be housing more than one polling location.

With regard to the 2020 General Election, the Division was wholly dilatory and waited nearly 65 days to follow up with the location that hosted the Primary. Thus, the Division created a situation where it was unable to notify voters timely and in a proper fashion of the change. It cannot be said that the timeline for the change with the 2020 General Election was due to anything other than the Division's negligence.

The Superior Court failed to consider the basis for the delay in moving the location. It was the Division's own malconduct that resulted in the failure to timely move the polling location and notify voters. The Division never intended to move the location back to Wayland Baptist; it instead assumed that the location would be at Muldoon Town Center. But the Division took no action immediately following the Primary Election to confirm Muldoon Town Center as a new polling location for the General election. Nor did it take any action to provide voters notice of its assumed changed location of Muldoon Town Center. Instead, the evidence demonstrates that in the 65 days between the Primary Election on August 18 and October 22 regarding the HD27-915 polling location, the only action by the Division that either Director Fenumiai or Supervisor Husmann could identify was the update to the Division website and hotline. This dilatory conduct cannot be considered good faith, and is a significant deviation from the norm. The timeline itself demonstrates bad faith reckless disregard to the law, and constitutes malconduct.

Once the Division finally executed on its duty to provide a polling location for the voters in HD27-915, it took the most minimal of efforts to notify voters, and arguably provided no notice of the change at all. It did not conform to the statute by any means, nor were there any attempts to provide notice in non-traditional ways outside of what the law requires such as television news, radio or social media.<sup>132</sup>

In an attempt to excuse their reckless behavior, the Division offered at trial that they did not have time to provide notice in the Official Election Pamphlet sent out on or about October 12, 2020, nor did they have time to send a mailing. However, had the Division acted in a reasonable and diligent fashion to secure the HD27-915 polling location, there would have been ample time; *i.e.*, these Division's so-called time restraints were of its own creation from its reckless and inexcusable inaction. This is made clear by the fact that the Division had a similar polling location in another precinct in HD27, and somehow managed to provide notice to voters in the Stuckagain Heights precinct that their polling location had changed, but utterly failed to provide voters in HD27-915 the same notice that is required by law.

The Division had knowledge in August that it had an issue with the HD27-915 polling location, but it failed to take any action with regard to the polling location until October 22, 2020, more than two months after the Primary Election. The Division

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<sup>132</sup> The Division was certainly aware of these available mediums, particularly given the language provided to the Division in the COVID-19 emergency declaration bill allowing for the Division to create emergency regulations and providing means to notify voters of the same.

contacted the owner of Muldoon Town Center that day to confirm the polling place for the extra precinct. The owner reported additional issues with the Division; *i.e.*, failing to notify him of the addition of a precinct, failing to timely collect the voting equipment, and a fall incident caused by an electrical cover used by the precinct. Therefore, the owner declined to have two polling locations in his building.

The Division confirmed the polling location change to Begich Middle School on October 27, 2020. But the Division failed to provide any notice that day as required by law, with the exception of the website and hotline change. Even the election chair for that precinct was not notified of the change until Sunday, November 1. That afternoon he placed a sign at the prior two precinct locations. The testimony from election workers who were at the HD27-915 polling location, and from a voter within that precinct, demonstrate the frustration and confusion that the Division created by its reckless disregard to provide proper notice to voters pursuant to law.

In its findings, the Superior Court found that it was not feasible to provide statutory notice given the time constraints between the time Begich Middle School was confirmed and the 2020 General Election. However, in doing so, the court wholly ignored the fact that the “emergency” was of the Division’s own making.

The testimony from expert Dr. Ruedrich demonstrates that when comparing the General Election Day voter turnout in HD 27-915 to two similar precincts within the same House District, there was an undervote, meaning some individuals were unable to cast their ballots. These individuals such as Mary Jo Cunniff, had voted in the same place for several

years and received no notice from the Division of the location changes. This failure of notice clearly resulted in the loss of at least 57 voters of their fundamental right to freely cast their vote.

At paragraph 17, the Superior Court errantly cited the testimony of Ms. Cuniff in its findings. The Transcript demonstrates that Ms. Cuniff provided approximate times in response to several questions. She testified that she left her house at approximately 8:20 or 8:30 AM.<sup>133</sup> She went on to note that she arrived at Begich Middle School at probably 8:45 AM.<sup>134</sup> However, the court failed to account for the fact these times were approximate. The court went on to conclude that no voters were prevented from voting due to the lack of notice. However, the testimony of Ms. Cuniff provides otherwise. Ms. Cuniff, due to the lack of notice and coupled with her obligations for the day, was not able to go back to Begich Middle School and cast her vote. She was frustrated by the polling place change because the same thing had happened during the Primary in 2020. Ms. Cuniff testified that she never received notice from the Division of the change, that no such notice had been received since the location had been moved several years prior to Wayland Baptist, and at that point a notification card was received in the mail. Therefore, there was evidence that the lack of notice caused issues for voters and the court's finding was in error.

In paragraph 27, the Superior Court found that the Division, Director and Region II Supervisor acted in good faith. However, such finding was wholly unsupported.

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<sup>133</sup> Tr. at 114.

<sup>134</sup> Tr. at 119.

Particularly, as the court went on to note that there was more the Division could have done. Good faith is constituted by best efforts or “faithfulness to one’s duty or obligation.”<sup>135</sup> It cannot be said that doing nothing for 65-days when there is a known issue is good faith or carrying out one’s duty or obligation. Indeed, it is the exact opposite. The court offered no support for its findings other than to demonstrate the ways the Division failed the general voting public, and therefore its finding was errant.

Despite the fact that the Division was well aware of its duty,<sup>136</sup> and indeed had carried out its duty to notify voters of a polling location change within another precinct within HD27 during 2020, the Superior Court found without explanation that the deviation was not done knowingly or in reckless disregard of the statutory requirements.<sup>137</sup> While it is presumed that this finding is based on the court’s failure to consider the significant time that lapsed with the Division acting in a dilatory fashion and taking no action, again the court’s findings were unsupported. This was not an emergency change, but a creation by the Division’s own doing which by its own words left it “scrambling” just before the General Election Day. Had the Division acted with good faith in either following up with Muldoon Town Center or finding another polling location following the Primary, it would have had ample time to provide the requisite notice required by law.

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<sup>135</sup> Black’s Law Dictionary 307 (2<sup>nd</sup> pkt. ed. 2001).

<sup>136</sup> Conclusion of Law, paragraph 4.

<sup>137</sup> Although Stuckagain Heights also had a voting location change in 2020, voter notification cards were mailed out to each voter in that precinct as is required by law. Tr. at 62-63.

This knowing and reckless disregard by the Division with regard to notice requirements in the law constitutes malconduct. This type of behavior in no fashion can be condoned as it undermines the public confidence and brings into question the integrity of the election. This malconduct had a random impact on voter behavior, and one that biased one candidate because of voting method preferences during the 2020 General Election. The evidence that at least 57 voters were disenfranchised, which the court ignored, is sufficient to change the outcome of the election. Because the Division cannot add votes that were not cast, and it would be improper to now inquire into past intentions, the only remedy is a new election.

**2. *Motion to Dismiss.* Was it error for the superior court to dismiss a sufficiently-plead complaint in this expedited election contest?**

Alaska R. Civ. P. 8(a) provides that the complaint need only contain a “short and plain statement of the claim showing that the pleader is entitled to relief” along with demand for judgment of such relief. Here, jurisdiction and standing were noted pursuant to AS 15.20.540 and AS 15.20.550, providing notice that Appellant intended to prove that the Division engaged in malconduct sufficient to change the outcome of the election. Pursuant to AS 15.20.540, in pertinent part, a defeated candidate may contest the election of any person based upon either malconduct on the part of an election official or any corrupt practice sufficient to change the results of the election. In its claim for relief, Appellant requested an order that due to the errors on the part of the Division, that the true winner could not be determined and a new election must be conducted in accordance with law.

Alaska R. Civ. P. 12(b)(6) provides for dismissal only in those cases where Plaintiffs have failed to state a claim upon which relief may be granted. In considering such motion, the court must “deem all facts in the complaint true and provable.”<sup>138</sup> The complaint must be liberally construed.<sup>139</sup> Motions to dismiss are disfavored and must only be granted in rare circumstances.<sup>140</sup> Indeed, the same should only be granted where “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>141</sup>

The Superior Court erred in dismissing Count II of the complaint. First, the court indicated that it would disregard any unplead factual assertions pursuant to *Candle v. Mendel*, 994 P.2d 372 (Alaska 1999). However, the court considered those matters outside of the pleadings, and thus, if the court intended to consider the same, this motion would have been converted into a motion for summary judgment.<sup>142</sup> Therefore, the court erred in advising it could not consider such matters, as it was well within the court’s discretion to do so.<sup>143</sup>

Furthermore, the court misinterpreted the law. In support of its dismissal the court relied on *Dale v. Greater Anchorage Area Borough*, 439 P.2d 790, 792 (Alaska 1968).

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<sup>138</sup> *Guerrero v. Alaska Housing Finance Corp.*, 6 P.3d 250, 253 (Alaska 2000).

<sup>139</sup> *Forrer*, 471 P.3d at 583.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* citing *Martin v. Mears*, 602 P.2d 421, 429 (Alaska 1979) (quoting *Schaible v. Fairbanks Med. & Surgical Clinic, Inc.*, 531 P.2d 1252, 1257 (Alaska 1981)).

<sup>142</sup> See e.g. *Martin v. Mears*, 602 P.2d 421 (Alaska 1979).

<sup>143</sup> *Id.*



However, that case is wholly distinguishable from the instant matter. In *Dale*, there was a failure to meet a condition precedent, as the appellant failed to deliver written notice as required by the Borough ordinance.<sup>144</sup> There is no such condition precedent here, and therefore the provided justification is not applicable. Furthermore, the court relied upon the court's notation in *Miller v. Treadwell*, where it was noted that Miller raised a new claim in the course of briefing regarding felons that was not filed in any complaint.<sup>145</sup> Indeed, that is not the case at hand where the issue regarding notice and moving the polling location was filed in the original complaint.

It was error for the Superior Court to dismiss the complaint with regard to Count II, and therefore it was proper for evidence to be taken, and for this Court to review this election contest.

## **CONCLUSION**

The Superior Court erred in its dismissal of Count II regarding the polling place location change for HD27-915, and in its multiple errant findings of fact and conclusions of law. The Division of Elections engaged in malconduct with regard to its failures related to the polling place location for HD27-915 on the General Election Day. Such malconduct was sufficient to change the outcome of the HD27 election. Because voters were deprived of their fundamental right to vote, a new election must be ordered without delay.

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<sup>144</sup> *Dale*, 439 at 792-3.

<sup>145</sup> 245 P.3d 867, 877 (Alaska 2010).